

BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

GATX TERMINALS CORPORATION,	)	
	)	
Appellant,	)	
	)	PCHB NO. 87-69
v.	)	
	)	
STATE OF WASHINGTON, DEPARTMENT	)	FINAL FINDINGS OF FACT,
OF ECOLOGY,	)	CONCLUSIONS OF LAW
	)	AND ORDER
Respondent.	)	

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This matter involves GATX Terminal Corporation's appeal of the State of Washington Department of Ecology's issuance of a \$5,000 civil penalty (No. DE 86-S178) for alleged violations on November 14, 1986 of waste discharge permit conditions (No. WA-000041-8) at their facility in Vancouver, Washington.

A formal hearing was held on October 2, 1987 in Vancouver. Present for the Board were: Judith A. Bendor (Presiding), Wick Dufford (Chairman), and Lawrence J. Faulk (Member). Attorney Lawrence E. Hard of LeSourd & Patten represented appellant GATX. Assistant Attorney

1 General Jeffrey S. Myers represented respondent Department of  
2 Ecology. Court Reporter Tami L. Kein recorded the proceedings.

3 Briefs were received. Witnesses were heard; exhibits were  
4 admitted and examined. Argument was made. From the foregoing the  
5 Board makes these

## 6 FINDINGS OF FACT

### 7 I

8 Appellant GATX Terminal Corporation operates a chemical processing  
9 facility and packing plant located in the Port of Vancouver,  
10 Vancouver, Washington. Among other products, the plant produces  
11 antifreeze. An array of chemicals are present on site, including  
12 ethylene glycol, an ingredient of antifreeze.

13 At all times relevant, GATX's discharges into the Columbia River  
14 were subject to the terms and conditions of National Pollution  
15 Discharge Elimination System ("NPDES") Waste Discharge Permit (No.  
16 WA-000041-8) issued by the State of Washington Department of Ecology  
17 ("DOE").

### 18 II

19 The DOE is a state agency authorized to implement the State water  
20 pollution control statutes, and in that capacity, to issue NPDES  
21 permits for the discharge of industrial wastewater into waters of the  
22 state, and to monitor compliance with the terms and conditions of such  
23 permits. RCW 90.48.180 and 90.48.260.

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III

The NPDES permit for the GATX facility was issued on August 16, 1978. It was modified in 1980, to allow the discharge of 700 gallons per day of untreated, uncontaminated storm water to the Columbia River

The permit contains General Conditions, of which the following are relevant:

G1. All discharges and activities authorized herein shall be consistent with the terms and conditions of this permit. The discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by this permit shall constitute a violation of the terms and conditions of this permit.

[ . . . ]

G5. The permittee shall at all times maintain in good working order and efficiently operate all treatment or control facilities or systems installed or used by the permittee to achieve compliance with the terms and conditions of this permit.

[ . . . ]

G7. The permittee shall, at all reasonable times, allow authorized representatives of the Department:

a. To enter upon the permittee's premises for the purpose of inspecting and investigating conditions relating to the pollution of, or possible pollution of, any of the waters of the state, or for the purpose of investigating compliance with any of the terms of this permit.

b. To have access to and copy any records required to be kept under the terms and conditions of this permit.

- 1 c. To inspect any monitoring equipment or  
2 monitoring method required by this permit; or  
3 d. To sample any discharge of pollutants.

4 [ . . . ]

5 The general conditions also prohibit the discharge or bypass of any  
6 discharge from facilities used by the permittee to maintain compliance  
7 with the permit's terms and condition (G3), except under specified  
8 situations. Any diversion or bypass must be immediately reported to  
9 the Department, and remedial action must be immediately taken to stop  
10 the unauthorized discharge and to correct the problem. G4. Such  
11 reporting action does not relieve the permittee from responsibility to  
12 maintain continuous compliance with permit conditions or from  
13 liability for failure to comply. G4.

#### 14 IV

15 In September 1986, trained DOE employees were on the Columbia  
16 River looking at discharges and saw what appeared to them to be a  
17 discharge of antifreeze coming from the GATX outfall and going into  
18 the River. The discharge was pink in color. DOE did not inform GATX  
19 about the September observations and no penalty was issued. Instead,  
20 DOE used this observation to prioritize its' review of monitoring data  
21 and its' reissuance of NPDES permits. The GATX permit had technically  
22 expired in 1983, but was still in effect because no new permit had  
23 been issued.

V

On Friday, November 14, 1986 two DOE inspectors saw a constant three to five gallons per minute green-colored discharge flowing out of the GATX outfall into the River. There was a green plume in the River and green blotches on rocks in the River. Photographs were taken.

VI

The inspectors went to the GATX reception area and asked to speak with a person authorized to make decisions. Mr. Merv Murphy, the operations manager for the past year, came out. He is in charge of the plant when the plant manager is gone.

The inspectors identified themselves. Together they walked out to see the discharge. The inspectors said they were going to sample and suggested Mr. Murphy concurrently take one; he did not do so. The manager went back into the building. The inspectors took 2 samples, one from the outfall discharge and one from the River, and also took additional photographs. No dead fish were seen.

Mr. Murphy rejoined them. The inspectors said they wanted to enter the packaging plant to do an inspection. The manager said he had strict instructions not to allow anyone to enter. One inspector explained the permit and the condition which required the permittee to allow DOE representatives access to inspect. The inspector further

1 explained that the permit was required to be on the premises and  
2 suggested Mr. Murphy try and find it. By this time, the discharge had  
3 ceased. The operations manager did not know where the permit was. He  
4 believed that DOE was required to have a search warrant to enter.

5 The inspectors renewed their request to inspect and said they  
6 would wait 20 minutes. During this time Mr. Murphy attempted to reach  
7 the plant manager, Mr. Marti, and other GATX management in the area,  
8 but was not successful. He did not call company headquarters in  
9 Chicago. The inspectors waited 20 minutes; during that time they were  
10 not granted entry to the plant. They then left.

#### 11 VII

12 The plant manager, upon subsequently learning about the access  
13 problem, called DOE later that same day. He spoke with one of the  
14 inspectors the next work day, Monday, November 17, 1986, and gave them  
15 permission to enter the plant. The DOE inspectors returned, inspected  
16 the plant, and explained to the plant manager that the November 14,  
17 1987 discharge and refusal to allow entry had violated the permit, and  
18 that a penalty would issue.

#### 19 VIII

20 The laboratory tests, done at the Environmental Protection Agency  
21 laboratory in Manchester, Washington, revealed the presence of ethynol  
22 glycol in both samples.

IX

The discharge occurred because a valve located in the plant's yard area had been left open. This valve prevents the release of contaminated wastewater into the River by sending it instead into a holding tank. Due to the open valve, ethynol glycol contamination instead discharged into the River. The exact source of this contamination from within the plant was not determined. During the inspection, the operations manager shut the valve and reclosed the entry lid. He did not inform the inspectors of what he did, nor was he asked.

Since the inspection, GATX has installed a flagging system on the valve to clearly show when it is open, and a \$100 chain and lock now secure the entry lid.

X

GATX had a copy of the NPDES permit on-site, but personnel there neither knew its' location nor were familiar with its' condition requiring inspection access. The Company had a manual, Environmental Guidelines, on-site, which is written for all GATX facilities nationwide. This GATX document provides a general overview of national environmental laws, but does not provide specific instructions to personnel regarding NPDES inspections, either nationally or specifically to Washington State.

1 GATX also had on-site a Safety Policy and Procedures Manual. The  
2 manual did not address DOE inspections. It did, however, provide  
3 instructions to personnel that Occupational Safety and Health  
4 inspectors are required to show a court-issued search warrant, and  
5 until company counsel in Chicago review the warrant and supporting  
6 affidavits, entry "shall not be allowed." (Exh. A-6).

7 We find that GATX had not provided adequate employee training on  
8 the NPDES permit inspection condition.

9 XI

10 On January 21, 1987, the Notice of Penalty (No. DE 86-S178) was  
11 issued for \$5,000. This is only one-quarter the maximum amount of  
12 penalty possible. GATX applied to the Department for relief from the  
13 penalty, which was denied on March 26, 1987. On April 13, 1987, GATX  
14 filed a timely appeal with this Board.

15 DOE has not previously issued any penalties to GATX..

16 XII

17 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
18 adopted as such.

19 From these Findings of Fact, the Board comes to these

20 CONCLUSIONS OF LAW

21 I

22 The Board has jurisdiction over these parties and these matters.  
23 Chpts. 43.21B and 90.48 RCW.

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26 FINAL FINDINGS OF FACT,  
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II

RCW 90.48.160 requires industrial operations which release liquid waste to waters of the state to obtain a permit. The NPDES permit issued to appellant GATX is an example of such a permit and fulfills the demands of both state and federal law. RCW 90.48.260. The permit was issued under the authority of RCW 90.48.180.

III

RCW 90.48.144 empowers the Department of Ecology to impose civil penalties on a strict liability basis. In pertinent part, it states:

Every person who:

(1) Violates the terms or conditions of a waste discharge permit issued pursuant to RCW 90.48.180  
[ . . . ]

(3)[ . . . ] shall incur, in addition to any other penalty as provided by law, a penalty in an amount of up to ten thousand dollars a day for every such violation.  
[ . . . ] (Emphasis added)

The Notice of Civil Penalty Incurred and Due (No. DE 86-S178) asserts that both the ethylene glycol discharge and the denial of access violated the NPDES permit "in violation of RCW 90.48.180".

Appellant argues that RCW 90.48.180 applies only to counties, municipalities and public corporations. This is not the case. The section was a part of the original statute enacted in 1955 and has always referred to all discharges required to obtain permits. See Sections 1 and 3, Chapter 71, Laws of 1955. Appellant has apparently been misled by the bold print section title added by the codifier.

1 This, of course, is not a part of the statute.

2 Appellant also argues that actions must violate RCW 90.48.080 in  
3 order for a penalty to be issued. The plain language of RCW 90.48.144  
4 authorizing penalties for permit violations refutes this contention.

5 IV

6 The discharge of ethylene glycol into the Columbia River was a  
7 discharge not authorized by the NPDES permit. The permit only  
8 authorized discharge of uncontaminated stormwater. Therefore the  
9 November 14, 1986 discharge violated the NPDES permit and RCW  
10 90.48.144.

11 V

12 We conclude that the access request was reasonable and the denial  
13 of access violated the permit and RCW 90.48.144.

14 The access violation is cause for particular concern. This  
15 inspection access requirement is a prerequisite for Ecology's  
16 participation in the federal NPDES program. EPA regulations require a  
17 state program to include certain conditions in its permits. See 40  
18 CFR Section 122.25(12). EPA requires that permits allow inspectors to

19 (1) Enter upon the permittee's premises where a  
20 regulated facility or activity is located or conducted,

21 [ . . . ]

22 (3) Inspect at reasonable times any facilities,  
23 equipment (including monitoring and control equipment),  
24 practices or operations regulated or required under this  
25 permit; and

1 (4) Sample or monitor at reasonable times, for the  
2 purposes of assuring permit compliance or as otherwise  
3 authorized by the Clean Water Act, any substances or  
4 parameters at any location. (Emphasis added)

5 Such inspections are a necessary part of a State regulatory effort.  
6 State personnel are limited, and the State cannot properly perform  
7 NPDES regulatory functions if denied reasonable access and required to  
8 return at a later time. GATX's compliance with the NPDES permit  
9 clearly and unequivocally requires reasonable access for inspection.  
10 (G7). Moreover, GATX personnel were not properly trained nor were  
11 clear written guidance provided on NPDES access provisions.

## 12 VI

13 In this instance, the scope of discharge was not severe. However,  
14 the remedy was obvious and inexpensive, and the violation could easily  
15 have been prevented. (In so concluding, we do note with some concern  
16 that by September 1986 DOE was aware that unlawful discharges may have  
17 been occurring and failed to warn GATX. A mere telephone call may have  
18 sufficed.)

## 19 VII

20 The purpose of civil penalties is to promote the violator's and  
21 the general public's compliance with the laws. In determining the  
22 proper amount of penalty, the severity of the violation, the conduct  
23

1 of the violator prior to the violation and any remedial action taken  
2 are to be considered.

3  
4 VIII

5 In 1985 the legislature increased the statutory penalty maximum  
6 to \$10,000 per violation per day, reflecting an intent to treat  
7 actions contravening the water pollution control statute with  
8 increased seriousness. Section 2, Chpt. 316, Laws of 1985.  
9 Weyerhaeuser Company v. DOE, PCHB Nos. 86-224 and 87-33 (March 28,  
10 1988); Bud Vos v. DOE, PCHB No. 86-149 (May 8, 1987). Here two  
11 distinct violations occurred and, therefore the total statutory  
12 maximum available was \$20,000. The Department of Ecology only  
13 assessed one-fourth of the total fine permitted. Under all the facts,  
14 we conclude that the penalty assessed in this case was reasonable.

15 IX

16 Any Finding of Fact which is deemed a Conclusions of Law is hereby  
17 adopted as such.

18 From these Conclusions of Law, the Board enters this  
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ORDER

The penalty is AFFIRMED.

SO ORDERED this 24<sup>th</sup> day of June, 1988.

POLLUTION CONTROL HEARINGS BOARD

Judith A. Bendor  
JUDITH A. BENDOR, Presiding

Wick Dufford  
WICK DUFFORD, Chairman

Lawrence S. Faulk 6/24/88  
LAWRENCE S. FAULK, Member